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Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1055, 73-1069,
73-1070, 73-1071, and 73-1072

BOWMAN TRANSPORTATION, INC., *et al.*,

Appellants,

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS,
FORT SMITH DIVISION

BRIEF FOR APPELLANTS BOWMAN TRANSPORTATION, INC., JOHNSON MOTOR LINES, INC., RED BALL MOTOR FREIGHT, INC., AND LORCH-WESTWAY CORPORATION, ET AL.

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IN THE

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OCTOBER TERM, 1973

Nos. 73-1055, 73-1069, 73-1070, 73-1071, and 73-1072

BOWMAN TRANSPORTATION, INC., JOHNSON MOTOR LINES, INC., RED BALL MOTOR FREIGHT, INC., LORCH-WESTWAY CORPORATION, ET AL., AND UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellants,

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, FORT SMITH DIVISION

BRIEF FOR APPELLANTS BOWMAN TRANSPORTATION, INC., JOHNSON MOTOR LINES, INC., RED BALL MOTOR FREIGHT, INC., AND LORCH-WESTWAY CORPORATION, ET AL.

OPINIONS BELOW

The opinions of the Three-Judge District Court (App. 1275 *et seq.*; 807 *et seq.*)[1] are reported at 364 F.

[1] "App." refers to the Appendix, Volumes I and II, filed by these Appellants.

Supp. 1239. The report of the Interstate Commerce Commission (App. 101 *et seq.*) is published at 114 M.C.C. 571. The final orders of the Commission (App. 363 *et seq.* and 1271) are not reported.

JURISDICTION

The judgment and opinion of the Three-Judge District Court were entered on September 11, 1973. Appellants United States and Interstate Commerce Commission filed a motion for amendment of judgment on September 17, 1973 (App. 795). On October 4, 1973, the District Court denied the motion. 364 F.Supp. 1266 (App. 807 *et seq.*). Timely notices of appeal were filed (App. 801, 803, 825, 827, 831). By order entered November 13, 1973 (App. 845), the time for docketing this appeal was extended to and including January 8, 1974.

On April 29, 1974, this Court noted probable jurisdiction and consolidated the five appeals. The jurisdiction of the Court to review the District Court's decision on direct appeal rests on 28 U.S.C. §§1253 and 2101(b) (1970).

QUESTION PRESENTED

Whether, in reversing the decision of the Interstate Commerce Commission based on a formal adjudicatory hearing, the Three-Judge District Court exceeded its jurisdiction and improperly adopted a novel and unwarranted concept of *de novo* review of administrative action by (1) substituting its judgment for that of the agency charged by law with administering the Interstate Commerce Act and the National Transportation Policy, (2) failing to apply the substantial evidence rule to the findings of the agency and its grants of authority to the three motor carrier Appellants and substituting therefor the clearly erroneous test, under the guise of holding the Commission's findings and conclusions arbitrary and capricious and an abuse of discretion, (3) changing the statutory relationship between hearing examiners and their agency with respect to initial and final decisions, and (4) holding the record "stale" and thus insufficient to warrant any Commission action upon that record upon remand.[2]

[2] This represents a consolidation of the following questions stated by the Court in noting probable jurisdiction. These questions are individually answered in the Summary of Argument.

No. 73-1055:

2. Can a Three-Judge District Court lawfully set aside and enjoin an order of the Interstate Commerce Commission granting an extension of a motor carrier certificate on the ground the Court does not agree with the order or may consider the evidence would warrant a different conclusion?

4. Whether Commission order issued following extensive hearings, involving a voluminous record, admittedly concluded within all time limitations and Commission rules can be judicially determined to be so stale "as a matter of law" to prohibit any required findings or further consideration. If so, when does such an administrative action reach that point?

No. 73-1069:

2. Whether in reversing the Commission's decision awarding certificates of public convenience and necessity the District Court employed erroneous standards of judicial review and improperly substituted its judgment for that of the agency.

No. 73-1070:

Whether the Three-Judge Court, in setting aside the administrative agency decision, abdicated or abandoned its judicial function by

(3) failing to give independent judicial consideration and review to the separate grants of authority to the intervening defendant motor carriers;

STATUTES INVOLVED

The following pertinent statutory provisions are set forth in App. 93-99:

1. The National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding § 1, Historical Note (1970).

2. Sections 17(4) and (5) of the Interstate Commerce Act, as amended, 49 U.S.C. § § 17(4) and (5) (1970).

3. Section 207 of the Interstate Commerce Act, as amended, 49 U.S.C. § 307 (1970).

4. Section 7 of the Administrative Procedure Act, 5 U.S.C. § 556 (1970).

5. Section 8 of the Administrative Procedure Act, 5 U.S.C. § 557 (1970).

6. Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706 (1970).

STATEMENT

This case involves the validity of the standards of review applied by a Three-Judge District Court to a decision of the Interstate Commerce Commission. If sustained by this Court, these standards inevitably will expand the scope of review to be applied by Courts of Appeals and Three-Judge District Courts to formal

(5) rejecting Supreme Court precedent limiting the Court's scope of review and thereby substituting its judgment for that of the agency charged with the responsibility therefor;

No. 73-1071:

Whether the Three-Judge District Court improperly adopted a novel and unwarranted concept of *de novo* review of Commission decisions and changed the statutory relationship between hearing examiners and their agency with respect to recommended and final decisions.

adjudication by the departments and agencies of the Federal Government.

This appeal seeks reversal of two orders under which the District Court set aside the Commission's grant of three certificates of public convenience and necessity. The District Court invalidated the Commission's findings (1) that the public convenience and necessity required the grant of motor common carrier authority to three applicants (Appellants Bowman Transportation, Inc., Johnson Motor Lines, Inc., and Red Ball Motor Freight, Inc.) to transport general commodities by motor vehicle over regular routes between specified points, generally in the Southeastern and Southwestern areas of the United States, and (2) that existing transportation service between the points involved was not reasonably adequate to meet the demonstrated needs of the shipping and receiving public (including Appellants Lorch-Westway Corporation, et al.).[3]

In an administrative proceeding of nearly 24,000 pages of testimony and approximately 2,000 exhibits, Appellees as Protestants unsucessfully had opposed the Commission grant of certificates to one or more of the three motor common carrier Appellants. The District Court mechanically adopted verbatim the proposed findings and conclusions of Appellees, who were Plaintiffs in the action before that Court, and also denied a Commission motion to remand the case to the agency.

The Agency Proceeding

After over seven years of administrative proceedings, the Commission, on September 6, 1972, made final its

[3]These are 41 of the shippers and receivers of freight which supported the application of Johnson Motor Lines, Inc., before the Commission and which were Intervening Defendants before the District Court (App. 827).

December 30, 1971, award of certificates of public convenience and necessity to Appellants Bowman Transportation, Inc. (Bowman), Johnson Motor Lines, Inc. (Johnson), and Red Ball Motor Freight, Inc. (Red Ball) (App. 1271). The award to Johnson authorized the single line carriage of general commodities between points in its existing 16-state system in the New England, Middle Atlantic, Southeast, and Gulf regions, on the one hand, and, on the other, specified points on proposed routes from New Orleans, La., to Houston, Tex., and from Atlanta, Ga., to Dallas/Fort Worth, Tex. The Red Ball award tied its existing network of routes in 10 Southwestern states to proposed service at such Southeastern cities as Atlanta, Ga., Birmingham, Ala., and Jackson, Miss. The Bowman grant unified its present system in the Eastern regions of the country with proposed service at 7 points in Arkansas, 2 in Kansas, 9 in Louisiana, 10 in Mississippi, 3 in Missouri, and 15 in Texas. 114 M.C.C. 580-582, 584-589, 612-614 (App. 110-112, 114-119, 158-160).

Between December 1964 and July 1965, the Commission received twenty applications from motor common carriers. These sought authority to conduct general commodity operations between points in the Southwest and Southeast, in order to meet the burgeoning transportation needs in and between the two regions. Subsequent to a prehearing conference held in 1966, the Commission ordered that ten of the applications be heard on a consolidated record by two hearing examiners.

Hearings commenced on March 21, 1966, and continued at 8 cities throughout the involved area for 147 days through August 24, 1967. 1,009 witnesses presented oral testimony, including 933 shippers and receivers of freight who supported the applications. 1,989 exhibits were received, including voluminous,

detailed studies depicting traffic flows between the Eastern, Central, Southeastern and Southwestern parts of the United States. Competing rail and motor carriers opposed these applications. The hearing admittedly involved "what is perhaps the most extensive record ever developed in connection with a single group of motor carrier application proceedings before this Commission." 114 M.C.C. 573 (App. 103).

On November 19, 1969, the two hearing examiners issued a recommended report and order (App. 863 *et seq.*). That decision found that all of the applicants were "capable of performing the operations proposed" (App. 866), but concluded that "the applicants have failed to establish that the present or future public convenience and necessity require the operations proposed" (App. 905).

Although all parties recognized that general commodities were involved, the examiners erroneously considered all applications collectively (*e.g.*, App. 891) and classified the freight into 45 categories (App. 869). In reaching their recommendation, the examiners de-emphasized the numerous complaints voiced by the supporting shippers (App. 874) concerning inconsistent and lengthy transit times, inadequate pick-up service, difficulties in tracing, and the handling of loss and damage claims (App. 875-889).

Multiple and voluminous exceptions and replies were filed respecting the initial decision. These included the exceptions of Lorch-Westway Corporation and 40 other shippers, who were permitted to intervene by the Commission. On December 30, 1971, the Commission, Division 1,[4] entered its report and order granting three, and denying the remainder, of the applications. 114

[4] Commission action by a Division thereof is authorized by 49 U.S.C. §17(4)(1970).

M.C.C. 571 *et seq.* (App. 101 *et seq.*).[5]

After a thorough reconsideration and re-evaluation of the evidence, the recommendations of the hearing examiners, and the exceptions and replies thereto, the Commission rejected the examiners' findings and adopted only their "summary of the evidence presented by the protestants [Appellees] as to their authorities, equipment and operations." 114 M.C.C. 575 (App. 105). In reaching its decision, the Commission concluded that the examiners' analysis of the evidence on a commodity basis had resulted in an atomized treatment which did not accurately reflect the needs of the territories and points involved. 114 M.C.C. 591 (App. 121). Accordingly, it completely regrouped the "supporting evidence on a geographic basis" in order to obtain "a clearer picture of the supporting witnesses' needs" (*Id.*). The Commission found that "[t]he evidence considered in its entirety is convincing that the additional services . . . will serve a useful public purpose, responsive to a public demand and need, and that available transportation services between the points and to the extent authority is granted herein are not reasonably adequate to meet the demonstrated needs of the shipping and receiving public." 114 M.C.C. 599 (App. 129).

The Commission's approval of the three applications turned fundamentally upon several correlative findings. First, the agency found that the record as a whole showed widespread public dissatisfaction with existing service (principally joint line in nature) from, to, and between the Southwest and the Southeast, Eastern

[5] Subsequently, the Commission, upon reconsideration of one of the denials, granted a fourth application, in part. *Jones Truck Lines, Inc., Extension-Atlanta, Ga.*, 117 M.C.C. 586 (1972), currently pending on judicial review in *Campbell Sixty-Six Express, Inc., et al. v. United States*, Civil Action No. 73-Civ-411-S (W.D. Mo.).

seaboard, and Gulf states, as well as a rapidly increasing public demand for additional motor common carriage of a direct, single line nature. 114 M.C.C. 601-602 (App. 131-132). It also found that the available transportation service between the points, and to the extent authority theretofore had been granted, was not reasonably adequate to meet the demonstrated needs of the shipping and receiving public. 114 M.C.C. 599-600 (App. 129-130). Finally, the Commission found that the gains to be derived by the public from the three new services outweighed any adverse effect the protestants might experience. 114 M.C.C. 611 (App. 157).

On or about December 30, 1971, petitions for reconsideration of the Commission's decision were filed. On September 6, 1972, the Commission, Division 1, acting as an appellate division, denied reconsideration of the Johnson, Red Ball, and Bowman grants (App. 363). On or about September 21, 1972, petitions were filed under the Commission's General Rule of Practice 101(a)(4), 49 C.F.R. §1100.101(a)(4) (Supp. 1973), requesting the entire Commission to rule and announce that the proceeding involved an issue of general transportation importance. On October 6, 1972, the entire Commission denied those petitions (App. 1271).

The District Court Proceeding

On October 4, 1972, suit was brought in the District Court to set aside the Commission's decision (App. 848). On October 11, 1972, the Three-Judge District Court was designated to hear the action (*Id.*). A hearing was held before the Senior District Judge on November 1, 1972 (App. 371 *et seq.*), who on November 7, 1972, entered a temporary restraining order against the Commission's decision. *Arkansas-Best Freight System,*

Inc. v. United States, 350 F. Supp. 539 (W.D. Ark. 1972).

After the filing of extensive briefs, a hearing was held before the entire Court on July 24, 1973 (App. 453 *et seq.*). Proposed findings of fact and conclusions of law were submitted by the parties on August 16, 1973 (App. 585-738). Twenty-six days later the Court filed its decision, 364 F. Supp. 1239 (App. 1275 *et seq.*), copying in almost its entirety Appellees' submission (App. 697 *et seq.*).[6] The Court's decision contained no specific references to the hearing record but solely to portions of Appellees' proposed findings.[7]

The Court, in effect, adopted the findings and conclusions of the hearing examiners denying the ten applications, and rejected the Commission's findings and conclusions supporting the grant of three of these applications. Further, the Court refused to remand the case to the Commission because the administrative record was allegedly "stale" and "because [since] the findings and conclusions of the Division are arbitrary, capricious and without rational basis, no useful purpose would be served" thereby. 364 F. Supp. at 1264 (App. 1319).

The Court decided that, even where an agency's findings of fact are supported by substantial evidence on the record, those findings may be "arbitrary, capricious, [or] an abuse of discretion" under Section

[6] There were three insubstantial changes in wording in §'s 4, 8, and 29 of the conclusions of law in the District Court opinion, 364 F.Supp. at 1257, 1258-1259, 1264 (App. 1305-1306, 1308-1309, 1319), which are matched with the same paragraphs as numbered by Appellees in their proposed findings and conclusions (App. 725-726, 727, 737). The Court's opinion, with paragraphs numbered as in Appellees' proposed findings and conclusions, appears at App. 739 *et seq.*

[7] *E.g.*, 364 F.Supp. at 1254, 1255 (App. 1299, 1301).

10(e)(B)(1) of the Administrative Procedure Act, 5 U.S.C. §706(2)(A)(1970). 364 F. Supp. at 1256-1257 (App. 1305). After paying lip service to the "well-settled principle" of "[t]he limited scope of judicial review of the decisions of independent agencies" and to sustaining administrative action "even though it [the Court] might disagree with the agency's conclusions or consider them contrary to the weight of the evidence", the Court proceeded to ignore those principles. 364 F. Supp. at 1256 (App. 1304).

According to the Court, an allegation of arbitrary and capricious action with respect to findings of fact permitted the Court to circumvent the substantial evidence rule and to base its opinion on a weighing of the evidence. Thus, the Court stated:

> "***Since these requirements [of Section 10(e)(B)(1)] are in addition to the requirement that agency action be supported by substantial evidence, a mere review of the sufficiency of the evidence will not suffice in a proceeding . . . where the agency action is alleged to be arbitrary and capricious and resulting from an abuse of discretion." 364 F. Supp. at 1258 (App. 1307).

Thereafter, the United States and the Commission moved the District Court to amend the judgment of September 11, 1973, by remanding the proceeding to the Commission for further action consistent with the Court's opinion (App. 795). In a second opinion entered on October 4, 1973, the District Court denied the motion. 364 F. Supp. at 1266 *et seq.* (App. 807 *et seq.*).

SUMMARY OF ARGUMENT

1. The District Court substituted its judgment with respect to the National Transportation Policy and the

public need for transportation in the Southwest and Southeast areas of the United States for the expert exercise of discretion granted by Congress to the Commission. The Court disagreed with the weight given by the Commission to the evidence and held that the evidence warranted a conclusion different from that reached by the agency. The Court thus refused to follow this Court's precedent that it is for the Commission to appraise the facts, to draw inferences therefrom, to exercise its expert judgment with respect thereto, to interpret the National Transportation Policy, and to decide where lies the public interest, even where the Court may disagree with the agency's ultimate disposition of the proceeding. (No. 73-1055, Question No. 2) (pp. 16-19, *infra*).

2. In its decision the District Court erroneously interpreted and misapplied the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 706 (1970), and thereby exceeded its jurisdiction. The substantial evidence rule was held inapplicable where it is merely alleged that the agency findings of fact are arbitrary, capricious, or an abuse of discretion. The Court therefore reviewed the record as if it had been made by a trial judge without a jury and, in effect, employed the clearly erroneous rule, inapplicable to administrative proceedings. The Court thereby reviewed *de novo* the record and substituted its judgment, as proposed verbatim by Appellees, for that of the agency. If allowed to stand, this decision will enlarge substantially the scope of judicial review prescribed by the Administrative Procedure Act and this Court's precedent thereunder, with consequent change in the relationship between the judiciary and the administrative agencies. As a result, an increased burden will be imposed upon the Courts in their review of agency action. (No. 73-1069, Question No. 2; No. 73-1070, Question No. (5)) (pp. 14-44, 47-49, *infra*).

3. The District Court accorded overwhelming weight to the hearing examiners' report, to override the Commission's decision. Such a result contradicts 5 U.S.C. §557(b) (1970) which provides that, in its final decision, the "agency has all the powers which it would have in making the initial decision." While a reviewing Court must look to an examiner's report as part of the whole record, such a report remains only a part of the whole record. It cannot be used, as here, as a controlling method of negating the Commission's decision. That exceptions were taken to the examiners' conclusions and that the Commission reached different conclusions were disregarded by the Court. Under this novel theory of law, the role of hearing examiners has been exalted to that of final decision, even where, as here, the agency with statutory responsibility in the motor carrier field reaches contrary conclusions. The result of the Court's action is to defeat the letter and the spirit of the Administrative Procedure Act and to nullify the Interstate Commerce Act. (No. 73-1071) (pp. 44-47, *infra*).

4. The District Court failed to defer to the Commission's expert judgment on the issue of the separate grants of authority to Bowman, Johnson, and Red Ball. The Commission properly rejected the examiners' consideration of all ten applications collectively, without the examiners' evaluation of the merits of the separate applications in light of the public need for increased service. The Court rejected the Commission's expert approach, based on established precedent, and reverted to the position of the examiners. (No. 73-1070, Question No. (3)) (pp. 47-52, *infra*).

5. The District Court held that the record in this case was "stale" because the "extensive record dealing with five or six year old facts" could not support the grant of a certificate in 1973 or 1974. No authority

was cited for this proposition. None exists so far as the facts of this case are concerned. By its very nature, an administrative proceeding creates a gap between the time the record is made and closed and final agency action taken. A further gap occurs when the agency action is judicially reviewed. What the Court, in effect, said was that, in Appellees' vigorous pursuit of their administrative and judicial remedies, the passage of time can so age the record that the Appellees' goal of reversing the agency is reached not because their arguments are meritorious but because the record has become "stale". This Court clearly has rejected such a result. Where the Commission decision is issued following extensive hearings, involving a voluminous record, concluded within all time limitations and Commission rules, a Court cannot judicially determine such proceedings to be "stale" as a matter of law. (No. 73-1055, Question No. 4) (pp. 54-58, *infra*).

6. This Court should find, on the record before it and in the Commission's own decision, that substantial evidence supports the agency findings and that the agency conclusions are warranted. Because of the serious misapprehension or gross misapplication of accepted principles of judicial review by the District Court, remand of this case to the lower Court for further review would serve no useful purpose. It would prolong seriously the inadequacy of service found to exist by the Commission. This Court should remand the case to the District Court with directions to affirm the Commission's decision. (pp. 38-60, *infra*).

ARGUMENT

Beyond question the Commission's decision is warranted by the substantial evidence recited in the

decision itself.[8] Indeed, Appellees never seriously have claimed that the Commission's findings were unsupported by substantial evidence. The law is clear, under this Court's precedent, that, where such substantial evidence supports the agency decision, the judicial review function of the Court is ended. Indeed, the District Court's opinion recited material evidence which supported the Commission's conclusion that the public convenience and necessity would be served by the grant of authority to the three Appellant motor carriers. However, the Court refused to evaluate, under the substantial evidence rule, the Commission's findings and conclusions supporting that grant.

The District Court flagrantly disregarded precedent as to when the judicial review function ends. It adopted a novel and unwarranted scope of *de novo* review. In effect, the District Court reviewed the Commission's decision under the clearly erroneous rule which has no application whatsoever to this proceeding. On the mere allegation of Appellees that the Commission's action was arbitrary and capricious and constituted an abuse of discretion, the Court below by-passed the applicable substantial evidence rule of the Administrative Procedure Act and erroneously expanded this Court's decision in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, to apply to formal agency adjudication. If the District Court's revision of heretofore established standards of review is allowed to stand, the relationship between the Courts and administrative agencies and departments of the Federal Government will be drastically altered, and the Courts will become but an extension of administrative adjudication.

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[8] See pp. 38-44, 50-53, *infra*.

I.

THE THREE-JUDGE DISTRICT COURT ERRONEOUSLY ADOPTED A NOVEL AND UNWARRANTED CONCEPT OF DE NOVO JUDICIAL REVIEW IN FLAGRANT DISREGARD OF THE DECISIONS OF THIS COURT.

Section 10(e)(B)(6) of the Administrative Procedure Act (hereafter APA), 5 U.S.C. § 706(2)(F)(1970), requires a reviewing Court to

> "(2) hold unlawful and set aside agency action, findings, and conclusions found to be–
>
> ***
>
> "(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."

The latter standard may only be used where "there is no statutory administrative hearing." *Administrative Procedure Act – Legislative History*, S. Doc. No. 248, 79th Cong., 2d Sess. 39-40 (1946) (hereafter S. Doc. No. 248). See, to same effect, *id.* at 214, 217, 278-280, 326, 370, 378; *Attorney General's Manual on the Administrative Procedure Act* 109-110 (1947) (hereafter Attorney General's Manual). As the Court stated in *Texas Mexican Ry. v. United States*, 250 F. Supp. 946 (S.D. Tex. 1966):[9]

> "The conclusion of the Commission finds support in the record as a whole, even though we might justifiably have made a different choice had the

[9] A Three-Judge District Court sitting in the Western District of Arkansas heretofore has reached a similar conclusion. *Patterson v. United States*, 178 F. Supp. 771, 773-774 (W.D. Ark. 1959).

> matter been before us de novo; and, therefore, this Court may not set the order aside." 250 F. Supp. at 950.

Only where a statute provides that the Court "shall review *de novo* the issues presented" does the Court "make an independent determination of the issues." *United States v. First City National Bank of Houston*, 386 U.S. 361, 368.

In this case the District Court reviewed *de novo* the decision of the Commission. Such a method of review was effected under the guise of the arbitrary and capricious standard contained in Section 10(e)(B)(1) of the APA, 5 U.S.C. § 706(2)(A)(1970).

> "***The reviewing Court shall –
>
> ***
>
> "(2) hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;"

In resorting to the latter standard of review, the Court nullified, and rejected the application of, the correct APA standard that agency findings shall be set aside under Section 10(e)(B)(5) of the Act, 5 U.S.C. § 706(2)(E)(1970), where

> "unsupported by substantial evidence in a case subject to [5 U.S.C.] sections 556 and 557 [Sections 7 and 8 of the APA] . . .;"

The Court thus resorted to the clearly erroneous rule of F.R.C.P. Rule 52(a).[10] See *Willis Shaw Frozen Express, Inc. v. United States*, 256 F. Supp. 257, 264 (W.D. Ark. 1966) ("The court may set aside determinations of the Commission only when clearly erroneous. . . .").

The District Court further erred in rejecting the precedent established by this Court that Commission

[10] "***Findings of fact shall not be set aside unless clearly erroneous. . . .***"

decisions are subject only to a limited scope of review. By applying a broad and novel scope of review, the Court substituted its own judgment for the expert opinion of the Commission, charged by statute with final administrative authority in the motor carrier field. In so doing, the Court refused to recognize the responsibility vested exclusively in the agency to "promote . . . adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers . . . all to the end of developing, coordinating, and preserving a national transportation system . . . adequate to meet the needs of the commerce of the United States." National Transportation Policy, 49 U.S.C. preceding § 1, Historical Note (1970).

That policy is "the yardstick by which the correctness of the Commission's actions will be measured." *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 87-88. This Court there stated:

> "We do not minimize the complexity of the task the Commission faces in evaluating and balancing the numerous considerations that collectively determine where the public interest lies in a particular situation. And *we do not suggest that the National Transportation Policy is a set of self-executing principles that inevitably point the way to a clear result in each case. On the contrary, those principles overlap and may conflict, and, where this occurs, resolution is the task of the agency that is expert in the field.****" 355 U.S. at 92 (emphasis added).

The reviewing Court's "task [is] to scrutinize the Commission's authority, not the substance of this exercise." *American Trucking Associations, Inc. v. Atchison, T., & S. F. Ry.*, 387 U.S. 397, 412. The Commission's informed appraisal of the facts in the

light of the National Transportation Policy must stand if there is evidence to warrant the decision. *McLean Trucking Co. v. United States*, 321 U.S. 67, 86-88.

A. The Court was required, but failed, to apply the substantial evidence rule to the findings of the Commission.

The District Court paid lip service to, but then refused to follow, well-established principles of a limited scope of review. 364 F. Supp. at 1256 (App. 1304). Under those principles, an agency decision will be sustained if it is within the agency's statutory powers and is based on appropriate findings which, in turn, are supported by substantial evidence. If these criteria are met, the reviewing Court will sustain the agency even though it might disagree with the agency's conclusions or consider them contrary to the weight of the evidence. *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 619-621; *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 488; *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535-536.

This limited scope of review was particularly appropriate where, as here, the District Court and Appellees attacked the exercise of the Commission's authority in the specific area of public convenience and necessity. The extent of the authority which should be granted entails not only a weighing of the evidence but the exercise of an expert judgment on the transportation problems which are involved. *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475, 489-490; *United States v. Maher*, 307 U.S. 148, 154. As this Court stated in *Interstate Commerce Commission v. Parker*, 326 U.S. 60:

> "Public convenience and necessity is not defined by the statute.***The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. [Citation omitted]. This, of course, gives administrative discretion to the Commission . . . to draw its conclusion from the infinite variety of circumstances which may occur in specific instances.***" 326 U.S. at 65.

Accord, Illinois Central R.R. v. Norfolk & W. Ry., 385 U.S. 57, 66; *United States v. Pierce Auto Freight Lines, supra*, 327 U.S. at 535-536; *United States v. Detroit and Cleveland Navigation Co.*, 326 U.S. 236, 241. An administrative agency is presumed to perform properly its official duties in the absence of clear evidence to the contrary. *Permian Basin Area Rate Cases*, 390 U.S. 747, 767; *Interstate Commerce Commission v. City of Jersey City*, 322 U.S. 503, 512-513.

Rejecting in practice this limited scope of review, the District Court made no attempt to examine the record to determine whether there was substantial evidence to support the Commission's findings. The District Court circumvented the substantial evidence rule, stating, 364 F. Supp. at 1258 (App. 1307):

> "***Since these requirements [Section 10(e)(B)(1), 5 U.S.C. §706(2)(A)] are in addition to the requirement that agency action be supported by substantial evidence, a mere review of the sufficiency of the evidence will not suffice in a proceeding, such as the one now before the court, where the agency action is alleged to be arbitrary and capricious and resulting from an abuse of discretion."

This conclusion, adopted verbatim from Appellees' proposed findings (App. 726), has no basis in law. More importantly, it makes infinite the scope of judicial review applicable to formal adjudication by Federal departments

and agencies. By its very terms, the District Court's standard of review comes into play where the party seeking judicial review, apparently or implicitly, acquiesces that there is substantial evidence to support the agency's findings.[11] The District Court's conclusion here stands for the proposition that, if the party challenging the agency action uses the magic words "arbitrary, capricious or an abuse of discretion," the Court, without more, is authorized to weigh allegedly competing evidence to reach a result different from that of the agency. The District Court should be reversed where, as here, it "misconceives the rationale" of this Court's precedent and, on an alleged principle of law, failed to affirm a decision where "on the record as a whole there is substantial evidence to support agency findings." *Central Hardware Co. v. National Labor Relations Board*, 407 U.S. 539, 547-548.

B. The clearly erroneous rule, in effect adopted by the Court, does not apply to judicial review of administrative decisions after formal hearing on the record.

Under the guise of the arbitrary and capricious standard of review, the District Court substituted the clearly erroneous rule for the substantial evidence rule.[12] The clearly erroneous rule differs from the substantial evidence rule. As the Attorney General has pointed out, *Administrative Procedure Act*, Hearings Before Subcomm. on Administrative Practice and Procedure, Senate Comm. on the Judiciary, 88th Cong., 2d Sess. 382 (1964):

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[11]Indeed, Appellees' complaint, instituting the judicial review proceeding before the District Court, contains no allegation that Commission findings were unsupported by substantial evidence.

[12]See *In Re Josephson*, 218 F.2d 174, 182 (1st Cir. 1954) (where "abuse of discretion" standard applied, "[o]ne is reminded of the 'clearly erroneous' standard in Rule 52(a)", F.R.C.P.).

". . . [T]he basic difference between the two rules is clear. The substantial evidence rule recognizes that an agency which administers a continuing regulatory program necessarily develops some degree of knowledgeability and expertness in the particular area of regulation.***The substantial evidence rule, in its practical application, recognizes this expertise.

"Under the 'clearly erroneous' rule, a reviewing court treats the findings of an administrative agency as it would the findings of a trial judge. District of Columbia v. Pace, 320 U.S. 701. . . . That rule recognizes no expertise. Both the appellate court and the trial court consist of judges. There is no general assumption that the trial judge is more expert in the special area than the appellate court judges."

The standard of substantial evidence involves "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620. This standard was adopted in the APA from this Court's decision in *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 229 ("such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"). See S. Doc. No. 145, 76th Cong., 3d Sess. 20 (1940) ("The phrase 'substantial evidence' . . . has been selected on the basis of the adjudicated cases."); S. Doc. No. 248, *supra*, at 320-321, 414; Attorney General's Manual, *supra*, at 76.

The clearly erroneous rule, on the other hand, only applies by its very terms to "all actions tried upon the facts without a jury", where the trial Court is the fact finder. F.R.C.P. Rule 52(a). As this Court held in *United States v. U.S. Gypsum Co.*, 333 U.S. 364:

"***It [Rule 52(a)] was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since *judicial review of findings of fact of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies* or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' ***" 333 U.S. at 394-395 (footnotes omitted) (emphasis added).

The Court below applied to judicial review of administrative agencies a standard which for thirty-five years has been considered and rejected by Congress and the Courts. That standard is inapplicable to judicial review of the findings of fact of an administrative agency made after a formal adjudicatory hearing. *United States v. U.S. Gypsum Co., supra; Corn Products Refining Co. v. Federal Trade Commission*, 324 U.S. 726, 739 ("The weight to be attributed to the facts proven . . . and the inferences to be drawn from them, are for the Commission to determine, not the Courts."). Even if this were a situation where an administrative agency "made a choice between two fairly conflicting views [of 'pure agency law'] . . . the [reviewing] Court . . . should have enforced the [agency's] . . . order." *National Labor Relations Board v. United Insurance Co.*, 390 U.S. 254, 260.

As recommended by the Senate Judiciary Committee in 1939, what became the Logan-Walter Bill provided that

". . . any decision of any agency . . . shall be set aside if it is made to appear to the satisfaction of the [reviewing] court (1) *that the [agency's] findings of fact are clearly erroneous;* or (2) that the findings of fact are not supported by substantial evidence. . . ." §5(a), S. 915, as reported in S. Rep. 442, 76th Cong., 1st Sess. 4-5 (1939) (emphasis added).

The phrase "clearly erroneous"

> "...in the review formula...was taken from [F.R.C.P.] rule 52 with respect to the weight to be given to the findings of fact of a trial judge without a jury." S. Doc. No. 145, 76th Cong., 3d Sess. 20 (1940).

However, Congress then rejected application of this concept to review proceedings. The Logan-Walter Bill, H.R. 6324, contained provision only for the substantial evidence rule. H.R. Doc. No. 986, 76th Cong., 3d Sess. 15 (1940). This bill was vetoed by the President. *Id.* at 1.

As drafted following the President's veto, all but one of the bills embodying a proposed Administrative Procedure Act did not provide for the clearly erroneous rule in judicial review of agency adjudication. *Administrative Procedure*, Hearings Before Subcomm. of Senate Comm. on the Judiciary, 77th Cong., 1st Sess. 16-17, 34, 852-853, 1074-1075, 1078-1079 (1941) (hereafter *1941 Hearings*). Section 10(e) of the APA, as enacted or as proposed, contained no provision for application of the clearly erroneous rule.

In 1955 the Second Hoover Commission, upon recommendation of its Legal Task Force, recommended to Congress the substitution of the clearly erroneous rule for the substantial evidence rule. Commission on Organization of the Executive Branch of the Government, *Legal Services and Procedure* 76 (1955); *Task Force Report on Legal Services and Procedure* 215, 217-218, 416 (1955); see Carrow, *Administrative Adjudication: Should Its Role Be Changed?*, 27 Geo. Wash. L. Rev. 279, 281-283, 294 (1959). According to the Task Force Report, *supra*, at 218:

> "***The task force has proposed that the rules of evidence applicable to civil non-jury cases be followed hereafter in administrative proceedings conducted by Federal agencies. The task force recommends that findings of fact, based upon formal administrative records, should be set aside if clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record."

This proposal, which was not accepted by Congress,

> "***[f]or many courts...would undoubtedly constitute a green light to enlarge the scope of review.***" Carrow, *supra*, 27 Geo. Wash. L. Rev. at 299.[13]

For nearly 20 years Congress has considered and consistently rejected this proposal to change the scope of judicial review in the APA. Though embodied in a proposed Code of Administrative Procedure drafted by the American Bar Association,[14] no such change was

[13] The Interstate Commerce Commission strongly opposed this provision. *Administrative Procedure Act*, Hearings Before Subcomm. on Administrative Practice and Procedure, Senate Comm. on the Judiciary, 88th Cong., 2d Sess. 93, 437 (1964). So did the Association of Interstate Commerce Commission Practitioners, 23 I.C.C. Prac. J., Nov. 3-4, 1955 at 46:

> "The effect of the proposed change is fundamental. It would require the court to substitute its judgment with respect to the facts and the discretion exercised by the agency for that of the agency.***"

[14] *Administrative Procedure Act*, Hearings Before Subcomm. on Administrative Practice and Procedure, Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 99 (1965). Hearings on a revised APA commenced before the Senate Judiciary Subcommittee on Administrative Practice and Procedure in July 1959, see *Administrative Procedure Legislation*, Hearings Before Subcomm. on Administrative Practice and Procedure, Senate Comm. on the Judiciary, 86th Cong., 1st Sess. (1959). In 1957 the American Bar Association had proposed a new Code of Federal Administrative Procedure to replace the APA, which embodied the clearly erroneous rule. S. 1070, 86th Cong., 1st Sess. (1959); S. 1887, 87th Cong., 1st Sess. (1961); see Benjamin, *A Lawyer's View of Administrative Procedure – The American Bar Association Program*, 26 Law & Contemp. Prob. 202, 223-34 (1961).

made in the judicial review provisions of the APA, despite extensive consideration of the subject matter. *E.g.*, S. 1663 and S. 2335, 88th Cong., 1st Sess. (1963); see *Administrative Procedure Act*, Hearings Before the Subcomm. on Administrative Practice and Procedure, Senate Comm. on the Judiciary, 88th Cong., 2d Sess. 40, 283, 286-287, 298, 313, 382, 401, 451, 670 (1964).

C. The substantial evidence rule precludes exclusive application of the arbitrary and capricious standard to agency findings based on such evidence.

Nowhere did Appellees or the District Court question whether the specific findings contained in the Commission's decision were supported by substantial evidence. Noting that "the agency action is alleged to be arbitrary and capricious and resulting from an abuse of discretion", the Court circumvented the substantial evidence rule, under Section 10(e)(B)(5) of the APA, 5 U.S.C. §706(2)(E), and applied only the arbitrary and capricious rule, under Section 10(e)(B)(1) of the statute, 5 U.S.C. §706(2)(A). Thus, the Court was able to find "no rational basis" for the weight given by the Commission to certain exhibits and testimony, nor could the Court "discern any rational basis" for certain of the Commission's conclusions. 364 F. Supp. at 1259-1262 (App. 1310-1316). This led to the inevitable conclusion, as worded by Appellees (App. 737), that "the findings and conclusions of the Division are arbitrary, capricious, and without rational basis". 364 F. Supp. at 1264 (App. 1319).

The Court claimed that the Commission's decision was based upon "subordinate findings that can be supported

only by a consideration of portions rather than the entire record". 364 F. Supp. at 1259 (App. 1309). But, in every adversary proceeding where factual issues are contested, conflicting evidence will be involved. In effect, the District Court held that all the evidence – not just substantial evidence – must support the Commission's findings of fact and its conclusions based thereon.

Contrary to that rationale, the statute only requires that the agency base its findings upon "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 229. Findings based upon substantial evidence therefore can be contrary to other evidence in the record. As this Court stated in *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620:

> "***... [T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.***"

1. *The legislative history of the Administrative Procedure Act does not support the District Court decision.*

The legislative history of the APA does not support the District Court's construction of the APA. As considered by the Congress in 1941, S. 674, 77th Cong., 1st Sess., "Federal Code of Administrative Procedure", provided in §311(e) thereof, in relevant part, *1941 Hearings, supra*, at 16-17:

> "(e) SCOPE OF REVIEW. – As to the findings, conclusions, and decision in any case, the reviewing court ... shall consider and decide ...

> all relevant questions of . . . (4) findings, inferences, or conclusions of fact unsupported, upon the whole record, by substantial evidence; and (5) administrative action otherwise arbitrary or capricious. . . ."

S. 675, 77th Cong., 1st Sess., contained a substantially similar provision in §805(4) and (5) thereof. *Id.* at 34. On this subject, the following colloquy occurred between Senator Joseph C. O'Mahoney, a member of the Judiciary Committe, and the late E. Blythe Stason,[15] then Dean of the University of Michigan Law School. *1941 Hearings, supra*, at 1359-60:

> "Dean Stason. May I put it this way: *We don't have any thought of trying to work into this bill a technique of weighing the testimony and giving the court the power to reverse fact decisions if it finds the weight of the testimony running counter to the administrative order.* ***
>
> "Senator O'Mahoney. *But I take it that it is not your desire to go so far as to enable the court to substitute its findings, inferences, and conclusions, for the reasonable findings, inferences, and conclusions of the agency?*
>
> "Dean Stason. *That is absolutely correct. The court should not be given the privilege of going that far. The court should look at the whole record and if it feels that a reasonable man, acting reasonably, might have reached the decision which was reached by the administrative agency, it should let the decision alone.*" (emphasis added)

[15] Dean Stason was a member of the minority of the Attorney General's Committee on Administrative Procedure which proposed a detailed "Code of Standards of Fair Administrative Procedure." *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 203, 217 (1941) (hereafter S. Doc. No. 8). The code was the progenitor of the bills then being considered by the Senate Committee.

Neither the Report of the Attorney General's Committee nor the legislative history of the bills, which became the APA after World War II, contain any support for the District Court's conclusion that the evidence can be reviewed under other than the substantial evidence rule where a party claims agency findings and conclusions were arbitary and capricious. As the Attorney General's Committee stated, Sen. Doc. No. 8, *supra*, at 88:

> "***The question whether the administrative finding of fact rests on substantial evidence . . . is really a question of law, for a finding not so supported is arbitrary, capricious, and obviously unauthorized."

In other words, the reviewing Court first must determine the substantiality of the evidence underlying the agency's findings. Otherwise, the Court would "determine independently which way the evidence preponderates," thus turning "administrative tribunals . . . into little more than media for transmission of the evidence to the courts." *Id.* at 91. Judicial review is expected "to *check* – not to *supplant* – administrative action. Review must not be so extensive as to destroy the values – expertness, specialization, and the like – which . . . were sought in the establishment of administrative agencies." *Id.* at 77 (emphasis in original). In considering proposed Section 10(e) of the APA, the Senate Judiciary Committee referred to the foregoing statements of the Attorney General's Committee. S. Doc. No. 248, *supra*, at 39.

> "Subsection (e) . . . seeks merely to restate the several categories of questions of law subject to judicial review. Each category has been recognized . . . . The several categories, constantly repeated by courts in the course of judicial decisions or opinions, were first established by the Supreme

Court as the minimum requisite under the Constitution. . . ."

The substantial evidence rule governs the conduct of agency proceedings and the review of agency decision where a record is made by formal adjudication under Section 7(c) of the APA, 5 U.S.C. §556(d):

> "***A sanction may not be imposed or . . . order issued except on consideration [by the agency] of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.***"

This language was inserted in the section by the House, after the Senate used the language, "relevant, reliable, and probative evidence." S. Doc. No. 248, *supra*, at 30, 207-208, 287. "***Obviously, the agency will proceed in accordance with the evidence which it finds reliable, probative, and substantial – there is no reason why the bill should not say so." *Id.* at 287, fn. 18.

Section 10(e) of the APA, 5 U.S.C. §706, requires the reviewing court to ascertain, in a case such as this, whether there has been compliance with the substantial evidence rule under Section 7(c) of the statute. The judicial review provisions of the APA, like other provisions of the Act, "are closely knit", S. Doc. No. 248, *supra*, at 194. The Act "is designed to operate as a whole, and. . .its provisions are interrelated." *Id.* at 216; see, to the same effect, 251, 305. If the substantial evidence rule embodied in two separate provisions of the APA has any statutory meaning and if the statute is designed to operate as a whole, then the arbitrary and capricious standard of judicial review never was intended to afford a judicial means of by-passing the substantial evidence rule. The error committed by the District Court has been well described by this Court in *Consolo v. Federal Maritime Commission, supra*:

> "***In effect, the standard of review applied and articulated by the Court of Appeals in this case was that if 'substantial evidence' . . . supports a conclusion contrary to that reached by the Commission, then the Commission must be reversed. This standard is not consistent with that provided by the Administrative Procedure Act." 383 U.S. at 618-619 (footnotes omitted).

2. *Overton Park does not support the District Court decision.*

The Court below relied principally upon this Court's decision in *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, for its erroneous conclusion that the substantial evidence rule can be nullified by use of the arbitrary and capricious rule. The District Court stated, in part, 364 F. Supp. at 1257 (App. 1305):

> "4. In Overton Park, supra, the court pointed out that in determining whether an agency decision was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,' the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' 401 U.S., at 416.***"

The lower Court's reliance is misplaced. Indeed, the words quoted from this Court's decision are out of context.[16]

Overton Park involved judicial review of an announcement by the Secretary of Transportation that he

[16]Based verbatim on Appellees' proposed findings and conclusions (App. 725). *Cf. First National Bank of Fayetteville v. Smith*, 365 F. Supp. 898, 902-903 (W.D. Ark. 1973), *appeal pending* (Nos. 74-1032 and 74-1050, argued June 13, 1974, 8th Cir.), where the Senior District Judge for the Western District of Arkansas applied this Court's holding in *Overton Park* to agency adjudication effected without a formal hearing.

had approved the route and design of a highway. The announcement was not

> "***. . . accompanied by a statement of the Secretary's factual findings. He did not indicate why he believed there was no feasible and prudent alternative route or why design changes could not be made to reduce the harm to the park." 401 U.S. at 408.

For the standard of review of that administrative action, according to the Court,

> "***. . . we must look to §706 of the Administrative Procedure Act, which provides that a 'reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found' not to meet six separate standards. In all cases agency action must be set aside if the action was 'arbitary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements. *** In certain narrow, specifically limited situations, the agency action is to be set aside if the action was not supported by 'substantial evidence.' And in other equally narrow circumstances the reviewing court is to engage in a de novo review of the action and set it aside if it was 'unwarranted by the facts.' 5 USC §§706(2)(E), (F). . . .
>
> ***
>
> "Review under the substantial evidence test is authorized only. . .when the agency action is based on a public adjudicatory hearing. See 5 USC §§556, 557 . . . . [T]he only hearing that is required by either the Administrative Procedure Act or the statutes regulating the distribution of federal funds for highway construction is a public hearing conducted by local officials for the purpose of informing the community about the proposed project and eliciting community views on the design and route. *** *The hearing is nonadjudicatory, quasi-legislative in nature. It is not designed to produce a record that is to be the basis of agency action – the basic requirement for substantial-evidence review.*" 401 U.S. at 414-415 (emphasis added).

This Court did not hold in *Overton Park* that the substantial evidence rule could be ignored in the case, as here, of contested agency adjudication by resort to the arbitrary and capricious rule. The latter standard was applicable in *Overton Park* because the agency adjudication was made informally, without the kind of formal record required by Sections 7 and 8 of the APA, 5 U.S.C. §§556, 557. *See Camp. v. Pitts*, 411 U.S. 138, 141-142. It is clear from the *Overton Park* decision that, if the provisions of Sections 7(c) and 10(e)(B)(5) of the APA, 5 U.S.C. §§556 and 706(2)(E), are to have any applicability to formal agency decision, *see Weinberger v. Hynson, Wescott & Dunning*, 412 U.S. 609, 622, fn. 19, the arbitrary and capricious standard in Section 10(e)(B)(1), 5 U.S.C. §706(2)(A), cannot be used to bypass the substantial evidence rule.

Indeed, if the agency findings are supported by the substantial evidence on the whole record, the findings, *ipso facto*, cannot be arbitrary, capricious, or an abuse of discretion. Thus, under *Overton Park*:

> "The [reviewing] court is authorized to hold a trial de novo in two instances. First, it may redetermine facts originally found in an adjudicatory action if the agency used inadequate factfinding procedures. Second, the court may find facts 'when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.' [401 U.S. at 415].
>
> *"The 'substantial evidence' test affirms agency action if reasonably supported by the record.* It

is to be used 'only when the agency action is taken pursuant to a rulemaking provision . . . or when . . . based on a public adjudicatory hearing.' [401 U.S. at 414].

> *"In all other cases, agency action will be set aside only if it is unconstitutional, outside the scope of agency authority, or 'arbitary, capricious, an abuse of discretion, or otherwise not in accordance with law.'* This was the standard of review applied in Overton Park." McCabe, *Recent Developments in Judicial Review of Administrative Actions: A Developmental Note*, 24 Adm. L. Rev. 67, 95 (1972) (emphasis added).

See, to the same effect, Note, *Recent Changes in the Scope of Judicial Control over Administrative Methods of Decision Making*, 19 Ind. L. J. 118, fn. 1 (1973).

3. Other cases upon which the District Court relied do not support its decision.

The other cases upon which the District Court relied do not support its holding. 364 F. Supp. at 1256-1257 (App. 1305).[17] The partial quotation by that Court from *Columbia Shippers & Receivers Ass'n, Inc. v. United States*, 301 F. Supp. 310, 319-320 (D. Del. 1969), does not support the lower Court's conclusion that the application of the substantial evidence rule to agency findings of fact, made after formal adjudication, can be overridden by resort to the arbitrary and capricious rule. In *Columbia Shippers*, the Court applied the arbitrary and capricious rule to a Commission conclusion of law.

> "Turning next to the Commission's determination that Columbia's practice of co-loading with other non-profit shippers' associations does not contravene the Act, *this issue being primarily a legal rather than a factual one*, the Court must apply, in addition to the 'substantial evidence' test generally

[17] Copied from Appellees' proposed findings (App. 725).

> applicable to this action, the standard of review set forth at 5 U.S.C. §706(2)(A):
>
> " '***the reviewing court shall
>
> ***
>
> " '(2) hold unlawful and set aside agency action, findings, and conclusions found to be–
>
> " '(A) arbitrary, capricious, an abuse of discretion, or *otherwise not in accordance with law.*'
>
> *Accordingly, the Court's focus on review is whether the evidence and the law will support the conclusion that Columbia's practice of co-loading with other non-profit shippers' associations does not bring Columbia within the terms of the provisions regulating freight forwarders. . . .*" 320 F. Supp. at 319-320 (emphasis added).

In *Columbia* there was no factual dispute on the issue of co-loading. This was the question to which the Court addressed itself in that part of the opinion relied upon by the District Court in this case. The *Columbia* Court concluded that, as a matter of statutory construction, the practice of co-loading was not an activity "subject to regulation" under the Interstate Commerce Act. 301 F. Supp. at 321. This was an issue of law to which the standard of 5 U.S.C. §706(2)(A) applied. It was not an issue of fact controlled by the substantial evidence rule of 5 U.S.C. §706(2)(E).

None of the other authorities, cited by Appellees and relied upon by the District Court, support its decision. None of them involved the substitution of the arbitrary and capricious rule for the substantial evidence rule in reviewing an agency decision based upon a formal hearing on the record.[18]

[18] *Eastern Central Motor Carriers Ass'n v. United States*, 239 F.Supp. 591, 594, 601 (D.D.C. 1965) (no fact issues involved; no rational basis for Commission failure to require "full

Indeed, *Mitchell Bros. Truck Lines, Inc. v. United States*, 225 F. Supp. 755 (D. Ore. 1963), *aff'd per curiam*, 378 U.S. 125, supports the contrary. Carefully distinguishing between the different standards of review applicable to the facts and the law, the Court stated:

> "We have carefully considered the other points and contentions made by plaintiff. The rulings of the Commission thereon were neither arbitrary nor capricious. *The Commission's findings, on each point raised by plaintiff, are supported by substantial evidence. To consider the weight of that evidence or the soundness of the reasoning by which the Commission reached its conclusions, is outside the province of this Court.****" 255 F. Supp. at 760 (emphasis added).

production of evidence" as to costs in rate-making proceeding); *Campbell Sixty-Six Express, Inc. v. United States*, 258 F.Supp. 529, 532, 535 (W.D. Mo. 1966) (there being "no material factual issues in this case," substantial evidence rule was not involved; "facts as found . . . do not supply any rational basis for the [legal] conclusion that the intervenor is now 'actually' in competion with these plaintiffs"); *Nashua Motor Express, Inc. v. United States*, 230 F. Supp. 646, 648, 650 (D.N.H. 1964) (in a case where "precise facts . . . are not at all clear", conclusions leaped to by Commission not supported by "requisite subordinate findings"); *Heavy-Specialized Carriers Conference v. United States*, 231 F.Supp. 968, 970 (E.D.Mo. 1964) (Commission "interpretation of a certificate issued by the ICC is properly with the ICC and not the courts"; hearing transcript supports factual findings); *Youngblood Truck Lines, Inc. v. United States*, 221 F. Supp. 809, 819 (W.D.N.C. 1963) ("Commission's findings of fact are supported by substantial evidence; . . . its conclusions of law are free of error"); *Omaha Grain Exchange v. United States*, 194 F. Supp. 929, 934, 936 (D. Neb. 1961) (in rate-making proceeding, substantial evidence rule applied to facts and abuse of discretion rule applied to legal conclusions; Commission order affirmed); *Stott v. United States*, 166 F. Supp. 851, 855, 856, 858-859 (S.D.N.Y. 1958) (Commission order approving exchange ratio in railroad merger affirmed; "substantial evidence" rule applied to facts; no error of law in Commission conclusions).

II.

IN ITS ERRONEOUS METHOD OF REVIEW, INVOLVING VERBATIM ADOPTION OF APPELLEES' PROPOSED FINDINGS AND CONCLUSIONS, THE DISTRICT COURT COMMITTED SUBSTANTIAL ERRORS.

In weighing the evidence under an improper standard of review, the Court, by the verbatim adoption of Appellees' proposed findings and conclusions, committed further errors of fact and law.[19] The Court below "missed the very essence of the judicial function in this case – the actual adjudication of the issues of law and fact." *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 138. The guidelines laid down by this Court in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, were not followed:

> "***Those [District Court] findings, though not the product of the workings of the district judge's mind, are formally his. . . .*** Those drawn with the insight of a disinterested mind are, however, more helpful to the appellate court.*** Moreover, these detailed findings were 'mechanically adopted' . . .and do not reveal the discerning line for decision of the basic issue in the case.***" 376 U.S. at 656-657.

Here, the District Court did not even "pick and choose and temper and select those portions [of findings and conclusions proposed by all parties] which better fit its own concept of the case." *Bradley v. Maryland Casualty Co.*, 382 F.2d 415, 423-424 (8th

[19]The submission of proposed findings and conclusions is a practice rarely encountered before an appellate tribunal.

Cir. 1967). Indeed, the review provided in this case hardly comports with the kind of review envisioned by Congress under 28 U.S.C. §2325.[20] The District Court's review was a clear example of the situation where ". . .the courts . . . substitute their or *counsel's discretion* for that of the Commission [which] is incompatible with the orderly functioning of the process of judicial review." *Burlington Truck Lines v. United States*, 371 U.S. 156, 169 (emphasis added).[21]

A. Substantial factual errors were committed by the Court in its de novo review of the record.

The District Court adopted erroneous findings of fact proposed by Appellees. Some more egregious examples of such errors follow. They should demonstrate to this Court the unwarranted standard of review used by the District Court.

[20]The procedure followed by the Court below has been condemned by the other Circuits. The continuation of Three-Judge District Court review of Commission decisions also has been questioned. Burger, C.J., *Report on the Federal Judicial Branch*, 94 S. Ct. 3, 5 (1973); Staff of Senate Comm. on the Judiciary, 93d Cong., 1st Sess., Judicial Review of Decisions of the Interstate Commerce Commission 2-3 (Comm. Print 1973) ("The Burden of Three-Judge Courts"); see *Swift & Co., Inc. v. Wickham*, 382 U.S. 111, 128-129; *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 92-93 (dissent by Frankfurter, J.); *Phillips v. United States*, 312 U.S. 246, 250.

[21]*Accord, In Re Las Colinas, Inc.*, 426 F.2d 1005, 1010 (1st Cir. 1970), *cert. denied*, 405 U.S. 1067; *United States v. Forness*, 125 F.2d 928, 942 (2d Cir. 1942), *cert. denied*, 316 U.S. 694; *Roberts v. Ross*, 344 F.2d 747, 751 (3d Cir. 1965); *Featherstone v. Barash*, 345 F.2d 246, 251 (10th Cir. 1965); *Chicopee Manufacturing Corp. v. Kendall Co.*, 288 F.2d 719, 724-725 (4th Cir. 1961), *cert. denied*, 368 U.S. 825.

Transit Studies.[22] The Court stated that "[t]he pivotal point of the Division's grant to Red Ball, Bowman and Johnson involved the treatment of evidence relating to the quality of existing service. . .", 364 F. Supp. at 1250 (App. 1293). Noting that the Appellees' studies "constituted the most important part of [their] evidence," 364 F. Supp. at 1259 (App. 1310), the Court castigated the Commission for acting "*ex mero motu*" in finding that Appellees' transit time studies "were entitled to little weight," thereby "depriving . . . [them] of any opportunity to defend their propriety or correct the alleged deficiencies". 364 F. Supp. at 1252 (App. 1295).[23] The record shows that Appellant Johnson challenged Appellees' studies in its March 24, 1970 exceptions (pp. 25-27) and in its reply dated August 16, 1972, to Appellees' petitions for reconsideration of the Commission's decision. The Commission did not act on its own motion.

In addition, the Court criticized the Commission for subjecting the Appellees to a "changed standard" with regard to transit time studies, which they were given no opportunity to meet. 364 F. Supp. at 1260 (App. 1312). However, the Commission has on several occasions accorded greater weight to transit studies of disinterested public witnesses than to studies of protestants performed for short periods when faced with the possibility that competitive service might be authorized. *Strickland Transportation Co., Inc., Exten-*

[22]Transit studies generally abstract shipping document data measuring the time freight was in transit from its origin to its ultimate destination in single line service or from its origin to point of interchange in joint line service. A shipment transported in "single line service" is originated and delivered by the same carrier. When transported in "joint line service", it originates on the line of one carrier and is delivered on the line of another.

[23]This is the same as Appellees' proposed finding (App. 715).

sion – Louisiana Routes, 77 M.C.C. 655, 663 (1958), *sustained sub nom., T.S.C. Motor Freight Lines, Inc. v. United States*, 186 F. Supp. 777, 791 - 792 (S.D. Tex. 1960); *Braswell Motor Freight Lines, Inc., Extension-Atlanta*, 100 M.C.C. 482, 493-494 (1966), *rev. sub nom., Dixie Highway Express, Inc. v. United States*, 268 F. Supp. 239 (S.D. Miss. 1967), *rev. sub nom., United States v. Dixie Highway Express*, 389 U.S. 409 (ICC affirmed).

Similarly, the Court rebuked the Commission for its alleged failure to consider recently-issued single line authorities as a part of the total competitive situation. 364 F. Supp. at 1253-1254 (App. 1299). The Commission's report expressly discussed those authorities and took them into account in deciding whether, and to what extent, the public convenience and necessity required authorization of additional service.[24] 114 M.C.C. at 574-576, 585-586, 600, 611, 627, 631 fn.6, 634, 759, 762, 764, 771-772, 777, 779, 782, 784, 792 (App. 104-106, 115-116, 130, 157, 173, 177 fn. 6, 180, 321, 324, 326, 333-334, 339, 341, 344, 346, 354).

Conclusions 12-18 of the District Court clearly reflect the Court's misunderstanding of the Commission's treatment of transit studies presented by Applicants, shippers, and Protestants. 364 F. Supp. at 1259-1261 (App. 1310-1314). While the Court stated that the Commission compared the studies presented by Applicants with those presented by Protestants, 364 F. Supp. at 1259-1260 (App. 1310-1311), such was not the case. The Commission only compared the transit time studies of supporting shippers with those of Protestants, on the issue of the adequacy of existing service. 114 M.C.C. 599 (App. 129). On the other hand,

[24]See also pp. 18-19 and App. C, Jurisdictional Statement, Bowman Transportation, Inc., No. 73-1055.

the Commission considered Applicants' transit studies solely on the question of the feasibility of their proposed operations. 114 M.C.C. 611 (App. 157).

The Court also erroneously stated that the shippers' studies " 'comprised only a *few* shipments made over a very extensive period of time,' whereas all protestants' studies included *all* shipments handled during the periods covered." 364 F. Supp. at 1251 (App. 1294) (emphasis in original). This phrase is a partial quotation taken out of context from the examiners' decision, which read in full: "In other instances [the shippers' studies] comprised only a few shipments made over a very extensive period of time; *and in some instances the bills represented substantially all shipments in a given period between certain points or areas*" (App. 876-877) (emphasis added). Only 2 carriers presented exhibits concerning movements prior to the notice of hearing. Seventy-eight of the shippers supporting the applications sponsored exhibits which covered movements in 1965, and 5 covered movements in 1964.

Inadequate Service. The Court conceded that, according to the examiners, "[m]ost shippers generally expressed dissatisfaction with inconsistent and excessive transit time" and "expressed other criticisms of existing service, including the pickup and delivery of shipments. It was also shown that certain carriers maintain various types of formal or informal restrictions as to certain types of traffic, while others fail to render consistent service to authorized points. . . ." 364 F. Supp. at 1245-1246 (App. 1283).[25] By themselves, these facts provide the substantial evidence for the Commission's

[25]A compilation of the examiners' findings with respect to inadequate service appears as Exhibit D to the Brief of Appellant Lorch-Westway Corporation et al. before the District Court.

findings of inadequate service. 114 M.C.C. 596-598 (App. 126-128).

The decision of the District Court requires the Commission to accord equal weight (1) to evidence of defects in the operations of an applicant for a certificate and (2) to evidence of inadequate service by a protestant to the application. 364 F. Supp. at 1252 (App. 1296-1297). The Commission repeatedly has rejected this requirement. *Spector Freight System, Inc., Extension–Whitley County, Indiana*, 111 M.C.C. 889, 893 (1970); *East Texas Motor Freight Lines, Inc., Extension–Mississippi and Louisiana Points*, 115 M.C.C. 122 (1972). Indeed, one of the Appellees was certificated during the course of this case notwithstanding its failure to accept shipments required to be transported by its existing certificates. *Campbell Sixty-Six Express, Inc., Extension*, 108 M.C.C. 80, 81 (1968).

Exceptions to Examiners' Report. The Court accepted Appellees' claim that, "applicants [Appellants] had not challenged any specific findings of the Examiners . . ." and that Appellants failed to challenge the accuracy of the examiners' findings respecting the testimony of the public witnesses. 364 F. Supp. at 1250 (App. 1292). Appellant motor carriers did except to certain of the examiners' findings, as well as to their conclusions. For example, Johnson's exceptions claimed that the examiners "failed to fairly consider, evaluate, and make essential findings with respect to the public witness testimony" (Exceptions, Mar. 24, 1970, p. 14). Bowman's exceptions stated that the examiners "erred in considering all ten applications collectively", "failed

to give effect to multiple complaints", "grouped witnesses according to commodities", based their report on broad generalities without specific findings, and considered testimony only in relation to commodities shipped to the exclusion of territories and points involved. (Exceptions, Mar. 10, 1970, pp. 13-23). Shippers excepted to major conclusions of the examiners which embodied subordinate findings of fact. (Exceptions, Mar. 24, 1970, pp. 22-23).[26]

Shippers' Exceptions. The Court found that "shippers' contentions were more political than judicial". 364 F. Supp. at 1255 (App. 1302). The agency "should not have permitted such parties to inject new issues, particularly since the Examiners were given no opportunity to rule upon such issues". 364 F. Supp. at 1263 (App. 1318).

The initial exceptions filed by Shippers March 24, 1970, related to the examiners' findings concerning anti-trust matters and their rejection of the public need for improved and expanded service. Supplementary exceptions filed August 20, 1971, updated the initial filing but were never accepted for the record by the Commission. 114 M.C.C. at 577 (App. 107). That "competition is our fundamental national economic

[26]Indeed, the Commission can review error in a hearing examiner's decision without exception with respect thereto. Section 8(b) of APA, 5 U.S.C. §557(b) (1970); ICC Rule of General Practice 97, 49 C.F.R. §1100.97 (Supp. 1973).

policy," *United States v. Philadelphia National Bank*, 374 U.S. 321, 372, is not a political issue. Exceptions based upon specific findings and conclusions of the examiners hardly involve "new" issues.

B. Substantial legal errors were committed by the Court in its de novo review of the record.

Role of Hearing Examiners. The District Court accorded overwhelming weight to the examiners' report, to override the Commission's decision. 364 F. Supp. at 1245-1250 (App. 1282-1291). Such a result contradicts both statute and case law.

The hearing before the examiners was conducted as a contested proceeding on the record pursuant to Section 205(c), (d), and (e) of the Interstate Commerce Act, 49 U.S.C. §305(c), (d), (e) (1970). A hearing involving the issuance of certificates of public convenience and necessity under Section 207 of that Act, 49 U.S.C. §307 (1970), is a hearing on the record subject to the provisions of the APA. *Minneapolis & St. Louis Ry. v. United States*, 361 U.S. 173, 192.

The report of the examiners was solely an initial decision pursuant to Sections 7 and 8 of the APA, 5 U.S.C. §§556 and 557 (1970). Under the latter section:

> "(b)***On appeal from . . . the initial decision [of hearing examiners], the agency has all the powers which it would have in making the initial decision . . .***"

Under this statute, as the Senior District Judge conceded in granting a temporary restraining order, "[t]he Commission is not bound by the findings of the

hearing officers and is free to reach conclusions upon the evidence contrary to those of its examiners." *Arkansas-Best Freight System, Inc. v. United States*, 350 F. Supp. 539, 544 (W.D. Ark. 1972).

The relationship between the examiners and the Commission was not the same relationship which existed between the Commission and the District Court. The Commission exercises all of the authority conferred upon it by statute. It can properly substitute its own judgment for the judgment of the examiner and itself reach an initial decision. The power of decision remains in the agency under 5 U.S.C. §557(b) and not in the examiner. 2 K. Davis, *Administrative Law Treatise* §10.04 (1958, Supp. 1970). "The Commission is not bound by the examiner's conclusions. Rather, the Commission is free to make its own independent determinations." *Frozen Food Express, Inc. v. United States*, 301 F. Supp. 1322, 1324 (N.D. Tex. 1969).

In *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 493, this Court held that the examiner's decision is only part of the whole record which the Court must review to determine if there is substantial evidence to support the Commission's decision. This holding was further explained in *Federal Communications Commission v. Allentown Broadcasting Corp.*, 349 U.S. 358.

In that case this Court reversed a Court of Appeals' decision which held that an examiner's findings could not be overruled by the agency unless there was a " 'very substantial preponderance in the testimony as recorded.' " 349 U.S. at 364. The Supreme Court stated that the FCC could not be limited to the "clearly erroneous" rule embodied in Rule 52(a), F.R.C.P., when reversing decisions of the examiner. The statute gave to the Commission, not to the examiner, the power to rule on the facts and the law. Therefore, the

relevant inquiry for the Courts was whether there was substantial evidence on the record as a whole to support the Commission's decision. 349 U.S. at 364-365.

In *Lorain Journal Co. v. Federal Communications Commission*, 122 U.S. App. D.C. 127, 351 F.2d 824 (1965), *cert. denied*, 383 U.S. 967, the petitioners complained that the FCC, in reversing the examiners' findings, did not give sufficient weight to the examiners' decision. The Court stated:

> "***But their [examiners'] authority to render initial decisions does not mean that the various boards and commissions are relegated to the role of reviewing courts who sustain fact findings of courts of first instance unless clearly erroneous, FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 364 . . . (1955). *The responsibility for decision is placed in the Commissioners appointed by the President and confirmed by the Senate to discharge the function of administering the statutes under the agency's cognizance.*" 122 U.S. App. D.C. at 131, 351 F.2d at 828 (emphasis added).

Thus, the Court held that it must sustain the Commission's decision if supported by substantial evidence, "even though there is also the contrary conclusion of substantial evidence to support the examiners". *Id. Accord, Towne Services House Goods Transportation Co. v. United States*, 329 F. Supp. 815, 820 (W.D. Tex. 1971).

While a reviewing Court must look to the examiner's report as part of the whole record, such a report remains only a part of the record. It cannot be used, as here, as a method of negating the Commission's decision. Under the novel theory of law adopted by the District Court, the role of hearing examiners has been exalted to that of final decision, even where, as here, the agency with statutory responsibility in the motor

carrier field reaches contrary conclusions. The result of the Court's action is to nullify the letter and the spirit of the Administrative Procedure Act and the Interstate Commerce Act.

Opportunity to Remedy Service Deficiencies. The District Court copied some of the examiners' findings with respect to evidence of inadequate existing service. The Court also adopted the position of the examiners that improvement of existing services first should be made by " 'the exercise of more diligence and care by the existing carriers and shippers'." 364 F. Supp. at 1249 (App. 1290). In effect, the Court thus held that the Commission must grant existing carriers an opportunity to remedy their own deficiencies before authorizing proposed service by other carriers. This is squarely contrary to *United States v. Dixie Highway Express, Inc.*, 389 U.S. 409, which held that:

> "The District Court erred in holding that it is the invariable rule of the Commission to grant existing carriers an opportunity to remedy deficiencies in service, and in holding that carriers have a property right to such opportunity before a new certificate may be issued upon a lawful finding of public convenience and necessity pursuant to the statute. The Commission's power is not so circumscribed.***" 389 U.S. at 411.

Adverse Economic Consequences to Appellees. The examiners found a "very serious economic effect which the *10* applications *collectively* may have upon existing carrier services" (App. 889) (emphasis added). The Commission evaluated each of the eight then remaining applications and reached the conclusion that the public interest warranted the grant of three applications. 114 M.C.C. 599-611, 615-622 (App. 131-157). The District Court ignored this evaluation by the agency. It found that Appellees would be adversely affected by the grant

of three applications, disregarding the fact that the examiners, upon whose report the Court chiefly relied, had found such adverse effect only if all ten applications were granted. 364 F. Supp. at 1262 (App. 1316-1317).

While the Commission "should consider the public interest in maintaining the health and stability of existing carriers", *United States v. Dixie Highway Express, Inc.*, 389 U.S. 409, 411, the fact that a proposed service may cause existing carriers to lose considerable traffic and the income therefrom, *Atlanta-New Orleans Motor Freight Co. v. United States*, 197 F. Supp. 364, 370 (N.D. Ga. 1961),

> "...has never been considered a violation of National Transportation Policy such as to afford grounds for refusing an applicant a certificate of public convenience and necessity. ***
>
> " 'Competition among public carriers may be in the public interest and the carrier first in business has no immunity against future competition. [Citations omitted]. Even though the resulting competition causes a decrease of revenue from one of the carriers, the public convenience and necessity may be served by the issuance of a certificate to a new competitor.' "

In this case the Commission specifically considered and correctly evaluated the adverse effect of the three grants of authority on existing carriers, 114 M.C.C. at 601-602 (App. 131-132):

> "Turning to the quantum of motor carrier service for which a public demand or need has been established on the record before us, we have already expressed our view that, considering the existing authorized services currently available in and between the considered territories, the volume of traffic here shown to be moving by the supporting public witnesses would not sustain the added services and operations proposed by all eight applicants and that the authorization of all such services could lead to unhealthy, if not cutthroat, competition inimical to the public interest. By the same token, there is on this record presented such substantial evidence of widespread public dissatisfaction with available transportation services (principally joint-line in nature) from, to, and between the areas here under consideration, as well as indications of a rapidly increasing demand therein for added motor carrier service of a direct, single-line nature, that the issuance of authority to only one of the remaining eight applicants would not be responsive to the public transportation requirements in these territories. Considering all these factors, . . . we conclude that the volume of traffic moving and to be moved within and between the considered territories supports, and the public interest requires, the issuance of somewhat competitive and overlapping authorities to Red Ball, Bowman, and Johnson."

III.

THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT WITH DIRECTIONS TO AFFIRM THE COMMISSION'S ORDER.

In its order refusing to remand the case to the Commission, the District Court stated that:

> "If this were to be done, the Commission would have before it an extensive record dealing with five and six year old facts. It is apparent, as a matter of law, that such facts could not lawfully support a finding of public need for additional motor carrier service in 1973 or 1974.*** " 364 F. Supp. at 1269 (App. 815).

In effect, nine years of what the Commission called "what is perhaps the most extensive record ever developed in connection with a single group of motor carrier applications", 114 M.C.C. 573 (App. 103), is to be set at naught as merely being of "historical value". 364 F. Supp. at 1270 (App. 817).

This Court can find, on the basis of the Commission's decision, that substantial evidence supports the agency findings of fact upon which the ultimate findings and conclusions of the Commission are based. Indeed, neither the District Court nor Appellees have ever challenged those findings under the substantial evidence rule. Further, the agency record is not "stale". With this factual basis, this Court should remand the case to the District Court with directions to affirm the agency decision.

A. The Commission's findings of fact were supported by the substantial evidence recited in the Commission's decision itself.

The Commission's report clearly sets forth the facts upon which it based its conclusion that the applications of Bowman, Johnson and Red Ball should be granted. In limiting the grant of authority to three carriers, the Commission cited its earlier decision in *Motor Freight Corp. Extension–Pottawattamia County, Iowa*, 106 M.C.C. 654, 657 (1968), where the agency stated that "[m]ultiple-application proceedings require care not only to avoid the proliferation of operating authorities not needed by the shipping public, but also . . . [to

select those] carriers with the ability to perform the proposed service." 114 M.C.C. 601 (App. 131). After noting that "the volume of traffic here shown to be moving by the supporting public witnesses would not sustain the added services and operations proposed by all eight applicants" (*id.*), the Commission concluded, 114 M.C.C. 599 (App. 129):

> "***In our opinion, the applications of Red Ball, Bowman, and Johnson should be granted to the extent set forth in our findings. The evidence considered in its entirety is convincing that the additional services so to be authorized will serve a useful public purpose, responsive to a public demand and need, and that available transportation services between the points and to the extent authority is granted herein are not reasonably adequate to meet the demonstrated needs of the shipping and receiving public."

The Commission found that three of the ten applications should be approved and that Bowman, Red Ball, and Johnson were best suited to meet the demonstrated public needs for an improved transportation service. 114 M.C.C. 601-602 (App. 131-132). The Commission's recognition and application of the substantial evidence detailing the increasing transportation importance and need of the Southeastern and Southwestern areas was in accord with its prior holdings. *Herrin Transportation Company, Extension–Jacksonville*, 69 M.C.C. 629, 637-638 (1957); *Roadway Express, Inc., Extension–Birmingham, Dallas, Houston*, 82 M.C.C. 689, 701 (1960).

The testimony and documentary evidence of the growth and transportation needs of the involved areas furnished substantial evidence on this record for the Commission's findings of public need in this case and

that Bowman, Johnson and Red Ball were best suited to fill that need: Bowman, 114 M.C.C. 584-586 (App. 114-116); Johnson, 114 M.C.C. 586-589 (App. 116-119); Red Ball, 114 M.C.C. 580-582 (App. 110-112). The needs of the public and the inadequacies of the existing service in each of the different territories proposed to be served by each of the three carriers were discussed by the Commission at length. 114 M.C.C. 591-598 (App. 121-128). Finally, the Commission carefully detailed the evidence supporting its findings that each of the three would serve a demonstrated public need: Bowman, 114 M.C.C. 604-609 (App. 150-155); Johnson, 114 M.C.C. 609-610, 611 (App. 155-156, 157); Red Ball, 114 M.C.C. 602, 603-604 (App. 132, 149-150). The Court completely disregarded these facts and failed to examine each of the three grants of operating authority on the basis of the substantiality of the findings and the adequacy of the evidence upon which each was grounded. *Akers Motor Lines, Inc. v. United States*, 352 F. Supp. 606, 612 (W.D. N.C. 1973).

The Commission found that some protestant carriers had published service restrictions and embargoes and that others had refused outright to handle traffic. 114 M.C.C. 596 (App. 126). This finding was supported by the substantial evidence of "about 70 of the shippers located at points in a total of 16 states". (*Id.*). The Commission described examples of these specific documented refusals and properly found that

> "***Other protestants generally refuse to interline, refuse shipments of less than a specified weight, refuse to serve directly authorized points beyond their gateways, refuse to maintain through routes, joint rates, or interchange arrangements for furniture and other specified commodities, and refuse to protect through routes or joint rates on interline movements of shipments involving more than two carriers." 114 M.C.C. 597 (App. 127).

The Commission found that the transit times of existing carriers were inconsistent and excessive. This finding was supported by the substantial evidence of "[a]pproximately 650 shippers" who complained about such inconsistent and excessive transit times. In corroboration of this testimony, "over 200 [shippers] introduced transit time studies demonstrating the undependable service they currently receive." 114 M.C.C. 596 (App. 126). The Commission found inadequate pickup and delivery service on the basis of the substantial evidence of "about 150 shippers located throughout 18 states." 114 M.C.C. 597 (App. 127). The Commission also stated that interline difficulties were unreasonably delaying the movement of traffic on the basis of the substantial evidence of "[a]pproximately 110 shippers." (*Id.*). Serious deficiencies also were found in existing transportation services by reason of loss and damage to shipments, tracing difficulties, and misrouting. This finding was based upon the substantial evidence of "about 200 shippers". (*Id.*).

The Commission found that a substantial number of shippers and receivers of freight throughout the involved territories were receiving complaints from customers because of inadequate existing service which had resulted in the shippers losing customers, business, and short-term discounts. These findings were based upon material evidence of "[a]pproximately 80 shippers in a total of 14 Southeast, Southwest and Midwest States". 114 M.C.C. 598 (App. 128, fn. 36).

These material findings based upon substantial evidence warranted the Commission's ultimate conclusion that the discharge of its duty to carry out the purposes of the Interstate Commerce Act and the National Transportation Policy required it to provide additional transportation service through the grant of authority to the three Appellant carriers. 114 M.C.C. 612-614 (App. 158-160).

B. An "extensive record dealing with five or six year old facts" neither invalidates the Commission's decision nor prevents affirmance of that decision by this Court.

Hearings in this case commenced in March 1966 and were concluded in August, 1967. The hearing examiners issued their report more than two years later in November, 1969. The case was submitted to Division 1 of the Commission in August, 1970. The latter's decision was issued December 30, 1971. As the result of Appellees' vigorous procedural steps, the Commission's decision became final and appealable on September 6, 1972. The District Court's decision was issued over a year later on September 11, 1973. In that decision the Court held that the "extensive record dealing with five or six year old facts" could not support the grant of a certificate in "1973 or 1974." 364 F. Supp. at 1269 (App. 815). In other words, according to the Court below, the record was "stale."

This Court's precedent invalidates the holding. *United States v. Interstate Commerce Commission (Northern Lines Merger Cases)*, 396 U.S. 491; *United States v. Pierce Auto Freight Lines*, 327 U.S. 515; *Interstate Commerce Commission v. City of Jersey City*, 322 U.S. 503. See *Chicago & N.W.R.R. v. Atchison, T. & S. F. Ry.*, 387 U.S. 326, 356 ("Thirteen years have elapsed since the complaints in this [rate] case were first filed.").

In *Jersey City*, after a seven-year proceeding (1937-1944) involving two hearings, two Commission decisions, and at least three Court decisions, this Court sustained the agency's refusal to reopen the hearing because the record was allegedly "stale".

> "***The Price Administrator's contention is that this record is 'stale' and that a fresh record is important. One of the grounds of resistence to administrative orders throughout federal experience with the administrative process has been the claims of private litigants to be entitled to rehearings to bring the record up to date and meanwhile to stall the enforcement of the administrative order. *Administrative consideration of evidence* - particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it - *always creates a gap between the time the record is closed and the time the administrative decision is promulgated.* This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. *If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.* ***" 322 U.S. at 514 (emphasis added).

In *Pierce Auto*, after at least six years of proceedings (1939-1945), the District Court remanded the cases involved to the Commission "to determine [an applicant's] . . . fitness 'to initiate and maintain one of [the trucking] lines in view of present conditions.'" 327 U.S. at 534. This Court held this action "unwarranted." *Id.*

> "We think the [District] court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true, as the opinion stated, that '. . . the courts must in a litigated case, be the arbiters of the paramount public interest.' This is rather the

> business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law." 327 U.S. at 535-536 (footnotes omitted).

The *Northern Lines Merger Cases* involved a record spanning the years 1961-1968, when review of the proceedings were initiated in the District Court. This Court's decision was issued two years later. The Commission's refusal in 1967 to permit up-dating of the record was held "not an abuse of discretion nor did it deny the appellant due process of law [citing *Jersey City*]." 396 U.S. at 520-521.

The drastic change in economic conditions resulting from the Depression, warranting a finding of a "stale" record, *Atchison, T. & S.F. Ry. v. United States*, 284 U.S. 248, provides no basis whatsoever for the District Court's finding. This is not a case where the "record pertains to a different economic era and furnishes no adequate criterion of present requirements." 284 U.S. at 261. That decision, of course, has been "promptly restricted . . . to its special facts, United States v. Northern P. Ry. Co., 288 U.S. 490, . . . and it stands virtually alone." *Interstate Commerce Commission v. City of Jersey City, supra*, 322 U.S. at 515. *Accord, United States v. Pierce Auto Freight Lines, supra*, 327

U.S. at 534-535; *Ann Arbor R.R. v. United States*, 368 F. Supp. 101, 110 (E.D. Pa. 1973); see 1 K. Davis, *Administrative Law Treatise* §8.18 at 603 (1958, Supp. 1970).

The District Court's decision ignored the Commission's consideration of changes in motor carrier operations in the areas affected by the grant of the three applications. 114 M.C.C. 574-576, 578, 585, 586, 600, 611, 627, 631, 635, 759, 762, 764, 771, 772, 777, 779, 782, 784, 792 (App. 104-106, 108, 115, 116, 130, 157, 173, 177, 181, 321, 324, 326, 333, 334, 339, 341, 344, 346, 354). As the Commission stated, 114 M.C.C. 576 (App. 106):

> "As indicated in Appendix D [App. 170-181], certain protestants request that official notice be taken of specified motor carrier changes, in the involved area, that have been approved and authorized by this Commission since the close of these hearings in August 1967. We may take official notice of our action in other proceedings which bear materially upon the issues under immediate consideration. [Citations omitted]. Accordingly, the actions affecting protestants have been noted in Appendix G [App. 319-356] and those actions affecting carriers not parties to this proceeding, although not specified in detail in this report, have nevertheless been accorded full and careful consideration in our present determinations." (footnote omitted).

Indeed, three of the Appellees received additional common carrier authority during the pendency of this

proceeding as late as 1970.[27] For these Appellees to claim (App. 737), and the Court to agree verbatim, 364 F. Supp. at 1264 (App. 1319), that the entire record in this proceeding was "stale" during a time period when the Commission authorized an increase in their own operations is to claim inequitably the benefits, but not the vicissitudes, of the passage of time. The District Court's failure to note these facts in the record shows the error of its opinion with respect to alleged staleness.

C. The District Court should be directed to affirm the Commission's order.

As the District Court itself stated, "[t]here must be an end to litigation." 364 F. Supp. at 1264 (App. 1319). Substantial support exists on the record before this Court to sustain the Commission's grant of the three certificates to Bowman, Red Ball, and Johnson. The Commission's action was proper under the circumstances. To remand the case to the District Court for further consideration would prolong an already lengthy proceeding and further postpone needed carrier service in the Southeastern and Southwestern areas of the United States.

As this Court stated in *Consolo v. Federal Maritime Commission*, 383 U.S. 607:

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[27]Braswell (Sub-No. 17), Campbell Sixty-Six (Sub-No. 106), and Mercury Freight (Sub-Nos. 11 and 12), see U.S. proposed findings to the District Court (App. 613). These applications were among the ten not selected for consolidation in the administrative proceeding now before this Court. Each of these Appellees, as applicants, stated under oath that a public need existed for the service each proposed. Section 206(b) of the Interstate Commerce Act, 49 U.S.C. §306(b) (1970). Each duplicated, to some extent, service to the territory which Appellants were authorized to serve.

> "Ordinarily we would be inclined to remand to the Court of Appeals for further consideration in light of the standard of review established by the Administrative Procedure Act. [Citations omitted]. However, in view of the fact that this controversy already dates back more than eight years, that it has been before the Court of Appeals twice and that the relevant standard is not hard to apply in this instance, we think this controversy had better terminate now. See O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504. . . ." 383 U.S. at 621.

The same rule of practical judicial administration has been applied in ICC cases. *Illinois Central R.R. v. Norfolk & W. Ry.*, 385 U.S. 57.

> "Appellees also insist that a new hearing be held so that evidence of 'present conditions' could be presented to the Commission rather than 'speculation.' It is true that this case has been pending for 10 years but this, rather than being a reason for holding additional hearings, operates to the contrary. We have concluded that the orders of the Commission were proper under the circumstances. We have found substantial support for its actions. Accordingly, it is our view that this matter be concluded.
>
> "The judgment is therefore reversed and the case is remanded to the District Court with directions to sustain the Commission's orders." 385 U.S. at 75.

No useful purpose would be served by a remand by this Court to the District Court. This case is one where the District Court "misapprehended or grossly misapplied" the standards of judicial review. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 491. Thus, this Court has found unwarranted or unnecessary a remand to a lower Court for further decision in *Chicago & N.W. Ry. v. Atchison, T. & S.F.*

Ry., 387 U.S. 326, 356 ("attacks on the legal validity of the Commission's findings . . . so insubstantial that no useful purpose would be served by further proceedings in the District Court"); *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 730 (remand with directions to enforce agency order); *cf. National Labor Relations Board v. Food Store Employees Union, Local 347*, ___ U.S. ___, 94 S. Ct. 2074, 2079 ("crystal clear" error by lower Court "renders a remand an unnecessary formality").

IV.

CONCLUSION

The Commission's decision contains substantial evidence supporting the agency's findings of fact and conclusions of law. Because of the serious misapprehension or gross misapplication of accepted principles of judicial review by the District Court, this case presents the appropriate instance where remand to the lower Court for a further and correct review of the administrative action would serve no useful purpose. The case therefore should be remanded to that Court

with directions to affirm the Commission decision.

Respectfully submitted,

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